

# The Cypriot Doctrine of Necessity within the Context of Emergency Discourse: How a Unique Emergency Shaped a Peculiar Type of Emergency Law

CHRISTOS PAPASTYLIANOS<sup>1</sup>

## Abstract

*The doctrine of necessity, which has been enshrined in the Supreme Court's Ibrahim judgment, emerged as a response to an emergency. Yet, the nature of the emergency has determined the basic characteristics of the doctrine of necessity, which makes it a unique case within the context of emergency law. The doctrine of necessity occurred through a constitutional crisis, which was created by the main political and institutional actors' strategically oriented activity regarding the application of the Cypriot Constitution during 1960-1963. The crisis led nearly to the collapse of the state and resulted in the complete incapacity of key state organs to operate. Thus, confronting necessity demanded not for an abrogation from the Constitution in order to increase the effectiveness of the institutions, as in a typical case of emergency, but in order to create the conditions which are necessary for them to operate at a primary stage. This differentiation determines the degree of similarity between the doctrine of necessity and the dominant paradigm of emergency law, which conceives emergency as a reason for derogation from the rule of law and the core principles of constitutionalism, even temporarily.*

**Keywords:** constitutional crisis, constitutionalism, doctrine of necessity, emergency law, rights, rule of law, Supreme Court

## The Doctrine of Necessity: Preliminary Remarks

The doctrine of necessity in Cyprus was initially linked to the inability of the Cypriot State to function in line with the organizational structure, the bi-communal system, which was established under the 1960 Constitution of Cyprus. It is characteristic of the Constitution of Cyprus that no reference is made in it to the concept of people. The citizens of Cyprus are not part of the Cypriot people but members of two separate communities (Greek and Turkish), membership in which is based on specific criteria, such as origin, language, cultural traditions and religion. It should be pointed out that citizens who do not belong to one of the two communities based on the

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1 Christos Papastylanos is Assistant Professor of Public Law in the School of Law, University of Nicosia. The first part of the article, 'The Doctrine of Necessity: Preliminary Remarks', is based on my contribution to a book co-authored with A. Emilianides and C. Stratilatis, on the Doctrine of Necessity [see fn42], entitled 'The Fundamental Rights of Turkish-Cypriots and the Doctrine of Necessity: Sovereignty and Territoriality as Presuppositions for the Exercise of Rights'.

above criteria are called upon to choose what community they would like to belong to.<sup>2</sup> This dual structure was also followed in establishing the bodies performing executive powers (the President of the Republic comes from the Greek community, the Vice-President of the Republic comes from the Turkish community), their powers being distinguished into powers exercised conjointly and powers exercised separately by each of them (see Articles 47-49 of the Constitution). As regards the Council of Ministers, its composition is based on a specific ratio of ministers from both communities (7:3). This dual structure is also apparent in the legislative function, as Greek Cypriot MPs are elected only by members of the Greek community and Turkish Cypriot MPs are elected only by members of the Turkish community. The Constitution contains similar provisions about the make-up of other key state bodies, such as the Supreme and Constitutional Courts, the staffing of the Attorney-General of the Republic, the Auditor-General, the Governor of the Central Bank and their assistants. In all cases it is provided that the assistants must belong to a community other than that of the head of a body. A quantitative distribution also exists in the composition of the public sector (7:3).

Nonetheless, although establishing cooperation between the two political communities, the Constitution contains no safeguards in the event the system is unable to function due to the two communities refusing to work together.<sup>3</sup> These conditions create the context in which the law of necessity was relied upon and applied in Cyprus, and our examination of the doctrine of necessity must be linked to these conditions. Failure to apply provisions of the Constitution to the bi-communal structure, paired with the inelastic application of other provisions to bi-communal structure, led initially to a complete paralysis in the functioning of key areas of the Cypriot State.<sup>4</sup> The inefficiencies patent in the organizational governance system adopted under the Constitution of Cyprus finally led to a ‘constitutional crisis’, with Turkish Cypriots leaving from all posts they held in the government and the House of Representatives, and the Presidents of the Constitutional and Supreme Courts, who

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2 See Article 2(1) and (2) of the Constitution of Cyprus.

3 See A. Emilianides, *Beyond the Constitution of Cyprus*, in Greek (Athens: Sakkoulas Publications, 2006), 38. It should also be noted that where constitutional arrangements operated efficiently in states with deep ethnic, religious or linguistic divisions, this was because the constitutions of those states left a number of critical issues open to future regulation or provided for flexible conflict resolution mechanisms on the legislative level or on the level of other bodies which functioned free of commitments of a constitutional nature. On this issue, see . Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, 2011), 30-51.

4 Constitutional provisions on the creation of two separate municipalities in the five largest cities, the establishment of a Cypriot army and the quota concerning recruitment in public sector were not immediately applied. On the other hand, the strategically oriented provisions that the two communities required separate majorities for passing tax laws lead to an inability to pass such laws.

did not belong to either of the two communities, resigning.<sup>5</sup> This development caused certain state bodies to become fully unable to operate in line with the provisions of the Constitution. This was the context within which the Supreme Court relied on and applied the doctrine of necessity for the first time.<sup>6</sup> From the outset, the doctrine of necessity, as it shows up in Supreme Court case law, has two dimensions. The first is about the factual background of its reliance, namely the complete inability of specific state bodies to function. The second is about the consequences of that inability in terms of the existence or absence of a Cypriot State in the form of a constituted state, a state ordered by and through its constitution.<sup>7</sup> In applying the doctrine of necessity, the Supreme Court attempts to go beyond the Constitution, with a view to maintaining constitutional order. Reliance on the doctrine of necessity here differs from the inability of existing state bodies to respond to an emergency exercising their powers under the Constitution. For Cyprus, state bodies were unable to function due to the two communities' lack of cooperation, which was the implied prerequisite for the efficient operation of the provisions on the organizational part of Cyprus' Constitution. This prerequisite was not a legally binding rule according to the constitutional framework; however, its absence had specific legal consequences in that the Cypriot State could not exist as a constituted state, whose coherence required state bodies to function as envisaged in the Constitution. Therefore, in Cyprus, necessity [the contingency] is caused by the complete inability of state bodies to carry out their duties rather than because carrying out duties under the Constitution is deemed inadequate for addressing contingencies.<sup>8</sup>

Therefore, the Court's reasoning in relying on and applying the law of necessity is not founded on Article 183 of the Constitution of Cyprus on responding to an emergency but on Article 179, according to which the Constitution is the supreme law of the Republic of Cyprus.<sup>9</sup> Justice Triantafyllides, who wrote the respective

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5 They came from neutral countries (Germany, Canada).

6 In *Attorney-General of the Republic v. Mustafa Ibrahim* [1964] CLR 195. This case was about the constitutionality of Law 33/1964, which merged the two supreme courts in Cyprus (Constitutional and Supreme Courts, whose functions were established in the Constitution of Cyprus) into one court.

7 See C. Kombos, *The Doctrine of Necessity in Constitutional Law*, (Athens: Sakkoulas Publications, 2015), 175; P. Polyviou, *The Case of Ibrahim, the Doctrine of Necessity and the Republic of Cyprus*, (Nicosia: Chryssafinis & Polyviou Publications, 2015), 35-45. About the constitutive function of the Constitution, see S. Holmes, *Passions and Constraints, On the Theory of Liberal Democracy* (University of Chicago Press, 1995), 163; E. A. Young, 'The Constitution Outside the Constitution', *Yale Law Journal* Vol. 117, No. 3 (2007), 417-422; F. Michelman, 'Constitutional Authorship, in *Constitutionalism: Philosophical Foundations*, ed. L. Alexander (Cambridge, Cambridge University Press, 2001), 64-65.

8 A major part of the reasoning of Judge Triantafyllides is based on this assumption.

9 See Kombos, *The Doctrine*, 166-168, Polyviou, *The Case Of Ibrahim*, 48-51. It should be pointed out that the declaration of a state of emergency required the involvement of the Vice President, who came from the Turkish Cypriot community and no longer performed his functions (Polyviou, *The Case of*

opinion, argued that the supremacy of a constitution is derived from the fact that it is founded on the will of the people, which had not happened in Cyprus. The Constitution of Cyprus is an ‘imposed’ constitution, as it was prepared by an *ad hoc* committee of experts on constitutional law: Professor Themistoklis Tsatsos, from Greece; Nihat Erim, from Turkey; and from the two Cypriot communities. The final text of the Constitution was signed by Sir Hugh Foot, the last Governor of the colony of Cyprus, Mr Georgios Christopoulos, the Consul General of Greece, Mr Turrel, the Consul General of Turkey, Archbishop Makarios and Dr Küçük, being both elected President and Vice President of the Republic, respectively, and it entered into force on 16 August 1960. In addition, the extremely cumbersome constitutional amendment process undermined from the outset the possibility of the citizens making changes to the Constitution. Therefore, the ‘constitutional engineering’ of Cyprus’ Constitution<sup>10</sup> effectively weakened the Constitutions’ substantive and symbolic nature as the supreme law of the state.<sup>11</sup>

In addition, the primacy of a constitution within any constitutional order is founded on the citizenry adopting it. The supremacy of an imposed constitution is limited because its adoption process did not involve the people, which is a condition for establishing their will as the utmost foundation of the validity of a constitution. That is, the main condition for a constitution to be considered the supreme law of a state is missing. In applying the relevant constitutional provision, it should not be overlooked that Article 179(2) imposes upon authorities exercising administrative functions or executive power the obligation to refrain from acting in a way repugnant to or inconsistent with the Constitution. Performance of this obligation should be verified by the judge while reviewing the constitutionality of laws. Applying this provision rigidly without due consideration of these factors would indeed cause the State to collapse, as it would be impossible for certain essential state institutions to function in the name of the formal constitution.

However, according to Judge Triantafyllides, given that accepting the view that a constitution both establishes and contributes to the collapse of the state is a legal

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*Ibrahim*. 56). Also, the state of emergency, envisaged in Article 183 of the Constitution of Cyprus, is about the adoption of measures to combat political violence. That is, it could be applied only to aspects of the emergency in Cyprus during 1963-1964, as a result of the action of paramilitary units that left victims on both sides. It is, however, extremely doubtful whether the withdrawal of Turkish Cypriot officers from state bodies constitutes an act of political violence.

10 ‘Constitutional engineering’ means mechanisms that prevent the manipulation of the constitution by way of incentives intended to limit the self-motivation of actors and to attain desirable constitutional behavior with a view to the smooth functioning of the state. About constitutional engineering, see-G. Sartori, *Comparative Constitutional Engineering* (New York University Press, 1997), 195-203. Although he does not use the term ‘constitutional engineering’, Jon Elster puts forwards some useful observations in his *Securities against Misrule* (Cambridge University Press, 2013), 15-98.

11 See *Ibrahim*, 222.

paradox and a performative contradiction,<sup>12</sup> the doctrine of necessity needs to be applied insofar as it is necessary for Cyprus to continue to function as a state under a constitution.<sup>13</sup> The necessity of maintaining the state acquires, in Judge Triantafyllides' reasoning, characteristics of a meta-rule for the interpretation of the individual constitutional provisions which are relevant to the system of governance.<sup>14</sup> In the reasoning of the judgment on the *Ibrahim* case, at least according to the view expressed by Judge Triantafyllides, the doctrine of necessity is based on an approach which distinguishes the concept of the constitution as the means of constituting a state from the idea that it limits the exercise of state power.<sup>15</sup>

In the case at hand, the issue that arose in Cyprus could not be addressed by mere reference to constitutional provisions and their purpose, as their efficient operation required a given, which turned out to be a requirement, that is the uninterrupted cooperation of the two communities. It is an extralegal given which affects both the formal constitution and the so-called material constitution.<sup>16</sup> After *Ibrahim*, the doctrine of necessity is recognized by the Supreme Court as a new source of law in the constitutional order of Cyprus. This allows departure from specific constitutional rules, with a view to saving constitutional order per se and ensuring the continuous functioning of the state institutions of Cyprus.

12 The term 'performative contradiction' means that the propositional content of a speech act contradicts the presuppositions of asserting it. An example would be a judgment handed down by a Greek court whose operative part would indicate that, although rule X is not in line with the Constitution, it, however, is applied in the case at hand, although Article 93(4) of the Constitution of Greece provides that courts shall be bound not to apply a statute whose content is contrary to the Constitution. On the concept of performative contradiction, see R. Alexy, *The Argument From Injustice: A Reply to Legal Positivism*, (Oxford University Press, 2010), 35.

13 See *Ibrahim*, 234.

14 For the existence of such a meta-rule, which can be founded on the provisions of the Constitution of the United States on the Oath or Affirmation of the President (Article II), which provides that the President of the United States must to the best of his ability preserve, protect and defend the Constitution of the United States, and for references to the practices of President Abraham Lincoln during the Civil War, see M. Stokes Paulsen, 'The Constitution of Necessity', *Notre Dame Law Review* Vol. 79, No. 4 (2004), 1257-1298. In particular, with regard to the divergence from constitutional legality with a view to preserving it, see S. Mattie, 'Prerogative and the Rule of Law in John Locke and the Lincoln Presidency', *The Review of Politics* Vol. 67, No. 1 (2005), 77-111.

15 About this distinction see L. C. Feldman, 'Lockean Prerogative: Productive Tensions', in *Extra-Legal Power and Legitimacy: Perspectives on Prerogative*, eds. C. Fatovic and B. Kleinerman (Oxford University Press, 2013), 80.

16 Namely the set of principles and rules which, irrespective of whether they are reflected in the formal constitution, constitute at a given time in history the actual source of validity and interpretation of the Constitution, according to the definition given by Professor Manitakis, see A. Manitakis, *Greek Constitutional Law I*, [in Greek] Sakkoulas Publications, 2004) 56. On the concept of material constitution, see also M. Goldoni, 'The Material Constitution', *Modern Law Review*, Vol 81 No 4, 2018, 567-597. In essence, the material constitution of Cyprus in 1963 indicates the full inability of the organizational part of the formal constitution to operate.

Currently, the doctrine of necessity forms an integral part of the discourse of the state institutions of Cyprus in certain fields.<sup>17</sup> It should also be noted that the function performed by the doctrine of necessity as a new source of law and meta-rule for the interpretation of the Constitution places Cyprus among those cases where the law of necessity is not considered an extra-legal given by the community of users of law, but on the contrary a part of the existing constitutional order.<sup>18</sup>

### **Doctrine of Necessity: Emergency and Constitutional Crises**

A critical parameter which should be looked at is whether the doctrine of necessity, as formulated in the judgment on the *Ibrahim* case, falls within cases classified as emergency. Just like any emergency law, the doctrine of necessity is an exception to the rule; that is, it departs from the applicable constitution. However, an exception to the rule does not imply that any situation which leads to a departure from applicable constitutional rules has the same impact on the validity of constitutional rules, in particular rules which are considered to be essential components of constitutionalism and the rule of law.

In principle, reliance upon and the application of the law of emergency in the *Ibrahim* judgment is the result of a constitutional crisis. Constitutional crisis is a situation where state bodies disagree on a proper way for performing their duties. However, this disagreement concerns the institutional capacity of those involved and affects the way in which they perceive how they should perform their duties. Namely, it is a disagreement which involves not only different interpretations of the meaning of a constitutional provision, but, mostly, different interpretations of its purpose, and such different interpretations have a decisive impact on how state bodies should perform their duties. The disagreement touches upon issues connected with and directly affecting the constitutional design of the organization of a state. A constitutional crisis also has a factual background. In order to have a constitutional crisis, the disagreement must affect the functioning of state bodies. There is no constitutional crisis if state

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17 See Emilianides, *Beyond*, 137-143, Kombos, *The Doctrine*, 179-207. This remark does not mean that the bodies of the Cypriot State can rely upon and apply the doctrine of necessity as they see fit. The doctrine of necessity is part of the material constitution (see footnote no. 16 on the concept of material constitution) and, therefore, the bodies of the Cypriot State can rely upon and apply it only within the limits established in case law for the doctrine of necessity; review of these limits is verified by the courts. The doctrine of necessity is not a supra-constitutional rule, rather to the contrary it is part of the Cypriot constitutional order, see Emilianides, *Beyond*, 131.

18 As regards the distinction between approaches which consider 'necessity' part of the constitutional order (mainly characterized by the fact that they consider necessity a source of law and an interpretative meta-rule) and approaches which consider 'necessity' an extralegal given, see O. Gross and F. N. Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, (Cambridge University Press, 2006), 47 and K. L. Scheppele, 'Legal and Extralegal Emergencies', in *The Oxford Handbook of Law and Politics*, eds. K. E. Whittington, R. D. Kelemen, and G.A. Caldeira, (Oxford University Press, 2008), 165-187.

bodies are not affected and continue to function uninterruptedly, despite differences in interpretation. After all, disagreement is a component of political life in modern democracies. For a constitutional crisis to exist, disagreement must cause upset, hence making it impossible to apply the constitution.<sup>19</sup>

A line, however, must be drawn between an emergency and a constitutional crisis, as the two concepts are not identical. It is possible to have an emergency without a constitutional crisis, the opposite being equally true. An emergency may lead to a constitutional crisis if state bodies disagree in terms of the urgency and intensity of the situation, as well as in terms of the constitutional limits of a response to this necessity. If they do agree, then the emergency does not lead to a constitutional crisis. On the other hand, a constitutional crisis is not necessarily the result of an emergency, such as if a state body acts contrary to the explicit provisions of the Constitution, which does not envisage an efficient mechanism for complying with constitutional precepts.<sup>20</sup> In this case, the crisis is not caused by the need for an immediate response to a practice which runs counter to the Constitution. In this practice, the timing of the response is not the critical element causing the constitutional crisis. Thus, there is a constitutional crisis but not an emergency.

However, just because a constitutional crisis is not identical to an emergency does not mean that these two phenomena are totally unlinked. Levinson and Balkin made distinctions between the various forms of constitutional crises. The first type of constitutional crisis is where institutional actors publicly state their intention not to apply the guarantees afforded by the constitution because a situation needs to be responded to as an emergency and faithfully complying with the constitution would result in an inefficient response. For such a situation to be considered a constitutional crisis, it must be impossible for the governance system to function as provided for in the constitution. Relying on the necessity to depart from the Constitution and employing processes not envisaged in it must be the result of failing to resolve disagreements by applying processes the Constitution provides or the result of the actors' belief that in a given case the Constitution is unable to maintain the political actors' disagreements within the bounds laid down in its provisions.<sup>21</sup>

A second type of constitutional crisis is when a conflict between political actors is not hindered by the Constitution because their actions are not beyond but within the constitutional limits. In this case, the Constitution is the problem and not the solution.<sup>22</sup> The third type of constitutional crisis involves situations where political

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19 See S. Levinson and J.M. Balkin, 'Constitutional Crises', in *Pennsylvania Law Review*, Vol. 157, No. 3 (2009), 714-717.

20 *Ibid.*, 717-718.

21 *Ibid.*, 721-728.

22 *Ibid.*, 737.

actors disagree about Constitutional precepts, which leads to both sides accusing the other of violating the Constitution. Certainly, a simple political disagreement would not fall under this category. The means that conflicting parties use to resolve their disagreement are crucial for determining whether a type three crisis exists or not. To have a type three constitutional crisis means to move outside the boundaries established by the constitution for publicly expressing political disagreements. Each party believes that the other party is taking steps not aligned with the Constitution for the purpose of defeating it, and therefore, each relies on this argument to justify arbitrary actions.<sup>23</sup>

In Cyprus, a type two constitutional crisis led to a type three crisis and ended up with a type one crisis with the *Ibrahim* judgment. To be exact, these crises were not successive, as they happened between 1960 and 1963, and they sometimes occurred simultaneously; simply, the importance and intensity of each type of constitutional crisis varied during this period. The 1960 Constitution of Cyprus envisaged a bi-communal system of governance, where both communities would share power on absolutely equal terms, regardless of their size. The 1960 Constitution of Cyprus contains 31 articles establishing that it is impossible to make a decision or complete a process without both communities' consent. Sixteen of these provisions give veto power to officers from each community, and the remaining require members of both communities to be involved in decision-making or to complete a process. These provisions apply to the composition of almost all state bodies. Therefore, it is possible for government institutions to be unable to make decisions or complete processes, because they do not have the consent of both communities and there is no provision for overriding the veto.

Veto power and qualified majority voting are mechanisms which ensure that the principle of separation of powers may act as a system of checks and balances to prevent one entity from having excessive power over the others. Against this background, the principle of separation of powers not only refers to the distinct domain of each branch but is also to a mechanism for preventing each from misusing their powers.<sup>24</sup> However, mechanisms of checks and balances, in particular the possibility that agents from one power can veto agents from the other two powers, are intended to set limits on the principle of majority and not to neutralize it. They are aimed at preventing impulsive majorities from making decisions and not at causing the principle of majority to become inactive.<sup>25</sup> For this reason, vetoing cannot, in the end, totally prevent a decision from being made which is based on the principle of majority, even

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23 Ibid., 739-740.

24 See A. Kavanagh, 'The Constitutional Separation of Powers', in *Philosophical Foundations of Constitutional Law*, eds D. Dyzenhaus and M. Thorburn (Oxford: Oxford University Press, 2016), 233-234.

25 See J. Elster, *Ulysses Unbound* (Cambridge University Press, 2000), 131, 137.



if a qualified majority is needed to curb a veto.

The veto power in the Constitution of Cyprus does not fall within the logic of checks and balances, because it prevents majorities from making decisions on issues which are of vital interest to both communities. In addition, the presidential system of governance, which favours zero-sum logic more than parliamentary governance does, is enshrined in the Constitution of Cyprus.<sup>26</sup> In the Constitution of Cyprus, this logic is enhanced by giving both the President and Vice President the veto without there being any mechanism to resolve the impasses that mutual vetoing could lead to. This resulted in that mechanism, which was intended to limit the consequences of the two communities disagreeing, causing intensified disagreements, as the Constitution of Cyprus offers no way to make not cooperating seem less attractive than working together.<sup>27</sup>

Furthermore, the Constitution of Cyprus does not envisage an effective mechanism to resolve disputes between state bodies, and the constitutional court cannot be used for such purpose. It has jurisdiction to judge whether the actions of state bodies are within the limits set by the Constitution; however, it cannot guide state bodies on how to perform their duties if they remain within the constitutional limits. Given that the Constitution itself allows vetoing on specific matters but does not establish mechanisms for resolving the impasses that vetoing could lead to, and that it does not foresee any consequences in the event that the two communities refuse to cooperate when they are required to make decisions or to complete processes, should the constitutional court find this practice to be contrary to the Constitution, it would be outside the limits of its jurisdiction to try to settle the issue. Elster correctly observed that a 'constitution should be a framework for action not an instrument of action'.<sup>28</sup> Although this practice of non-cooperation is a form of strategic action, it could only entail political sanctions and it would not be possible to be verified in court.

It should also be pointed out that the Constitution of Cyprus lacks mechanisms which would make it easier to express dissatisfaction with uncooperative actors on a political level. The system of governance is a presidential system,<sup>29</sup> with a fixed term

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26 See J. Linz, 'Presidential or Parliamentary Democracy: Does it make a Difference?', in *The Failure of Presidential Democracy*, eds J. Linz and A. Valenzuela (Baltimore: John Hopkins University Press, 1994), 18.

27 On the issue of mechanisms which make the lack of cooperation unattractive, as a factor for the successful implication of consociational models of government, see G. Tsebelis, 'Elite Interaction and Constitution Building in Consociational Democracies', in *Journal of Theoretical Politics* Vol. 2, No. 1 (1990), 22.

28 See J. Elster, *Ulysses*, 101.

29 However, Vice Presidential powers in Cyprus do not correspond to those envisaged in a presidential governance system. P. Polyviou quotes De Smith on the Constitution of Cyprus in referring to a vice presidential system, in P. Polyviou, *Cyprus on the Edge: A Study on Constitutional Survival* (Nicosia: Cryssafis and Polyviou Publications, 2013), 16.

of office for the President and Vice President, and it is not possible for Parliament to disapprove of them. In addition, under the Constitution of Cyprus, the President and the Vice President can remove ministers, but only those coming from their respective communities. Therefore, ministers are not loyal to a single state but to their communities, represented by the President and the Vice President. This allocation of power intensified the rigidity of the institutional actors.<sup>30</sup> Also, the design of the Constitution of Cyprus does not allow people to ‘exit’ their communities as a form of putting pressure on political elites to rethink their positions. The only way for a person to leave a community is by exiting from one of the two communities altogether.<sup>31</sup> Therefore, the Constitutions’ design does not prevent a type two constitutional crisis but rather creates the conditions for it. The inability of state bodies representing the two communities to cooperate is founded on the belief that their stance is aligned with their constitutional duties. That is, a failure to cooperate, which is a condition for the operation of the Constitution, is due to the fact that the actors did not violate the rules of the Constitution but rather acted in line with them.<sup>32</sup>

There were three main issues where the inability of the two communities to cooperate brings about this belief: the creation of separate municipalities for Turkish Cypriots; the creation of an army; and, the composition of the public service which is based on the Constitution’s quantitative distribution of the population [70-30]. Three fundamental articles of the Constitution [Articles 173(1), 129, and 78(2)] were

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30 According to Lijphart, the consociational form of governance must be accompanied by means to mitigate actors’ rigidity to enable the governance system to be functional. These mechanisms also include avoiding the presidential system as a form of governance, as it intensifies the problems generated by the absence of a mechanism for solving impasses, See A. Lijphart, ‘Constitutional Design for Divided Societies’, *Journal of Democracy*, Vol. 15, No. 2 (2004), 96-109. According to Lijphart, it was the absence of properly designed institutions that caused the systems of governance in Cyprus and Lebanon to become non-functional and not the adoption of the principles of the consociational model, *ibid.* 99.

31 The possibility to ‘exit’ can, under certain circumstances, provide incentives for cooperation and can contribute to constitutional stability. However, in order to be efficient in a constitutional order, such as that of Cyprus, it should be possible for persons disagreeing with the choices of the community to leave it to exert pressure on the representatives of the community in state bodies and to express dissatisfaction with their choices. A similar option, however, was not possible under the structure of the Constitution of Cyprus. On the role of the possibility of exit as a mechanism contributing to the efficiency of the Constitution and, therefore, to constitutional stability, see A.D. Lowenberg and B.T.Yu, ‘Efficient Constitution Formation and Maintenance: The role of “Exit”’, in *Constitutional Political Economy*, Vol. 3, No. 51 (1992), 51-72. Another parameter, pointed out in relevant literature regarding the possibility of ‘exit’ to provide an incentive for conflicting sides to cooperate and to not mutually annihilate the other, is that the ‘exit’ is efficient when the design of the constitution allows minorities to make decisions relevant to their members, thus affecting state policies, and not when it allows them to control all state functions, that is, when it is impossible to make a decision or implement a policy without their consent, see H.Gerken, ‘Exit, Voice and Disloyalty’, in *Duke Law Journal*, Vol. 62, No. 7 (2013), 1361.

32 See Levinson and Balkin, ‘Constitutional Crises’, 737.

not applied from the outset, because their application could be possible only if the two communities were to cooperate. Although desirable, this cooperation was not a binding rule according to the Constitution. Non-application was due solely to the way in which the representatives of the two communities perceived the performance of their constitutional duties.

However, it was not long before this practice led to a type three constitutional crisis, which is when each side argues that its opponents have violated the constitution, and the conflict between the two sides goes beyond the disagreement resolution limits set by the constitution. In order to prevail over the other side, each side is willing to employ means which, instead of expressing political disagreement, are intended to annihilate opponents. In Cyprus, the two communities were unable to implement the constitutional precept of observing the quantitative distribution in the public service composition [70-30] and disagreed in terms of the interpretation of the relevant provision and the reasons for not applying it. Greek Cypriots stressed that adhering to the constitutional precept was subject to the condition that 'This quantitative distribution shall be applied, so far as this will be practically possible' [Article 123(2) of the Constitution], and Turkish Cypriots insisted on its immediate application even if there were problems related to the efficient functioning of the public services (that is, they went around the condition set out in Article 123(2) of the Constitution). Reacting to the non-observance of the quantitative distribution condition in the recruitment of public servants, Turkish Cypriots refused to vote for a number of tax laws, whose adoption required, pursuant to the Constitution [Article 78(2)], a separate majority for both communities. This brought the implementation of this constitutional provision to a standstill and, therefore, there was no common tax legislation and tax collection mechanisms applicable to the entire territory.<sup>33</sup> Because the two sides disagreed about the application of a constitutional provision for the composition of the public service, and they each accused the other of unconstitutional practices, they could not cooperate on the adoption of tax laws, although this was a practice which cannot be literally considered to contravene the Constitution.

The second case where a constitutional provision became inactive when the two communities did not cooperate was over the composition of the army [Article 129 of the Constitution]. This provision did not envisage the way in which the army would be

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33 The resolution of the matter came from the separate adoption of tax laws by the two communities in line with Article 87(1)(f) of the Constitution, which provides that each communal chamber may impose personal taxes and fees on members of their respective community in order to provide for their respective needs. According to the judgment of the Constitutional Court, 'In the matter of article 144 of the Constitution and in the matter of a reference by the district court of Famagusta in criminal case no. 972/62 entitled, in the matter of tax collection law no.31 of 1962 and Hji Kyriakos and Sons Ltd of Famagusta, [Case no 298/62] these laws were found to be in line with the Constitution. See S. Soulioti, *Fettered Independence: Cyprus, 1878-1964*, Vol 1, (Minnesota University Press, 2006), 157-159.

created, but only its composition [2,000 men, 60% Greek Cypriots and 40% Turkish Cypriots]. However, there was disagreement from the outset on the organisation of the army, namely whether it would be a single army or it would consist of separate parts based on ethnic origin. In August 1961, the Council of Ministers decided by majority [7 Greek Cypriots for and 3 Turkish Cypriots against] that the army would be a single one. The Vice President disagreed and finally vetoed it, as he had the option to do under Article 50(1)(b)(i), causing the army not to be created.<sup>34</sup>

The third matter on which the two communities had disagreed and which caused a constitutional crisis with both type one and a type three characteristics was about the creation of separate municipalities for Turkish Cypriots. Under Article 173 of the Constitution, separate municipalities were to be created for Turkish Cypriots in the five largest cities, provided that the decision would be reviewed by the President and the Vice President of the Republic within four years of the date the Constitution was ratified. However, Article 78(2) of the Constitution required a separate majority for the adoption of laws relating to the creation of municipalities, whereas the transitional provisions of Article 188 established that laws on municipalities that preexisted the Constitution would end on 15 February 1961. In the end, the validity of the laws was extended to 31 December 1962. However, Turkish Cypriot MPs made a second attempt to extend the validity of the laws for an extra year, but Greek Cypriot MPs voted against it. As a result, no decision was made because Article 78(2) of the Constitution required separate majorities. Greek Cypriot MPs refused to vote for the respective proposed legislation, and based their arguments on their interpretation of Article 173(1), in particular as to whether the wording of the provision established that the composition of the separate municipalities was mandatory or optional. Turkish Cypriot MPs, on the other hand, proposed legislation to extend the validity of the previous laws, referring to the need to reach a solution which would not undermine constitutional order.<sup>35</sup>

Then, on 2 January 1963, the Council of Ministers, with a 7-3 majority, issued a decree which attempted to extend the legal status of the communities in the municipalities, with a view to side-stepping the constitutional provision, since the provision referred to municipalities and not to communities. As could have been expected, the Vice President exercised the right of return and veto vested in him under Article 57(2) of the Constitution. At the same time, the Turkish Communal Chamber passed a law to create separate municipalities in the five largest cities, pursuant to Article 87(1)(g) of the Constitution. That law was signed by the Vice President in breach of Articles 78(2) and 47(2) of the Constitution, pursuant to which that law should have been passed by separate majorities and published in the Official Gazette

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34 Ibid., 169.

35 Ibid., 180.

of the Republic jointly with the President.<sup>36</sup> Four recourses to the Constitutional Court followed regarding the validity of the decree and the law, and the Constitutional Court found that both the decree and the law ran counter to the Constitution. In these cases the Court ruled for unconstitutionality with a 2-1 majority, with the judges from both communities supporting the views of their respective community on the constitutionality of the laws in question.<sup>37</sup>

The issue of separate municipalities is typical in the way in which constitutional design can undermine the effective operation of a constitution. Many constitutions contain clauses entrusting the legislature to regulate matters which usually are regulated by the constitution. Such a strategy is adopted because, when a constitution is being designed, there is the likelihood that ‘passions’ can make it impossible to decide on a specific matter.<sup>38</sup> The option to entrust the regulation of a matter to the legislature is intended to give the parties involved an opportunity to make future decisions with a cool head. However, this option could prove efficient only when there are no factors that could prevent actors involved in the legislative process from behaving strategically. Otherwise, as experience in Cyprus has shown, this option is bound to remain inactive and is likely to give rise to a constitutional crisis, equivalent to that which the constitution designers had wanted to avoid by adopting that clause.

The Constitutional Court’s judgments on the separate municipalities failed to create the conditions for an understanding between the two communities. On the

36 Article 87(1)(g) provides that the Turkish Communal Chamber may legislate on matters where subsidiary laws relate to municipalities or communities. Namely, the activation of the process envisaged in Article 87(1)(g) requires a prior legislative framework for municipalities in line with Articles 78(2) and 173 of the Constitution

37 A unanimous judgment on unconstitutionality was made only with regard to the publication of the law by the Vice President and not jointly by the President and the Vice President. ‘In the matter of article 139 of the Constitution. The House of Representatives, and the Turkish Communal Chamber and/or the Executive Committee of the Turkish Communal Chamber, case no 12/1963’. However, that judgment also examined whether the Turkish Communal Chamber was competent to pass a law to create separate municipalities. In that case, the Turkish Cypriot judge held a minority view, arguing that the Turkish Communal Chamber had acted in line with the Constitution. On the same day, the Constitutional Court ruled on the constitutionality of the law, enacted by the Greek majority in the Parliament, which extended the legal framework concerning communities to municipalities, and the court held that the laws were unconstitutional, with the Greek Cypriot judge dissenting on the grounds of the doctrine of necessity, see footnote no. 19, Polyviou *The Case of Ibrahim*, 26-28, S. Soulioti, *Fettered Independence*, 193. The stance adopted by the judges from the two communities demonstrates that the existence of a third neutral judge does not in and of itself suffice to prevent an ethnic polarization within the context of constitutional adjudication. See Choudhry and R. Stacey, ‘Independent or Dependent? Constitutional Courts in Divided Societies’, in C. Harvey and A. Swartz, *Rights in Divided Societies* (Oxford: Hart Publishing, 2012), 102. It is worth pointing out that before these cases were heard, the Constitutional Court would usually have issued unanimous judgments.

38 See R. Dixon and T. Ginsburg, ‘Deciding not to Decide: Deferral in Constitutional Design’, *International Journal of Constitutional Law*, Vol. 9, No. 3-4 (2011), 638.

contrary, it widened the divide between the two communities and had the collateral effect of the president of the Constitutional Court resigning, hence causing the court to be unable to function. In November 1963, President Makarios proposed a set of 13 amendments to the Constitution, whose adoption would change the structure of the governance system significantly, as most of its consociational elements would have been eliminated. The Turkish Cypriot Vice President Fazıl Küçük refused to discuss the proposed amendments,<sup>39</sup> and Turkey, being one of the guarantor forces, threatened to take action should Greek Cypriots unilaterally adopted the amendments. In the meantime, riots broke out in December 1963, with hundreds of victims from both sides, and, in the final ten days of December 1963, Turkish Cypriot officers left all state bodies. Next, in January 1964, the Turkish Cypriots [Vice-President and MPs] declared that they did not recognize the legitimacy of the Cypriot government, and many Turkish Cypriots employed in the public service and the police stopped going to work.<sup>40</sup> By that time the situation showed all the characteristics of a type three constitutional crisis.

The fact that Turkish Cypriot officers had abandoned their offices and public servants, their posts, was not an act of civil disobedience. Acts of civil disobedience aim to change the terms of inclusion in a political community and do not call the existence of the civil community into question. Civil disobedience means doubting the application of the law without, however, questioning the fidelity to law, in particular in the Constitution, into question. Those who commit acts of civil disobedience desire to change policies by showing, through a specific application of the Constitution, that they are incompatible with the Constitution.<sup>41</sup> Every constitution depends on the existence of political community whose members believe that they act jointly for the fulfilment of common goals. Even if tacit, this belief is reflected in every constitution. Questioning the meaning of joint action when it comes to implementing common goals, and thus upsetting this condition, opens up a prospect for exercising a secondary constituent power that raises doubts about all fundamental and non-revisable elements of a constitution, albeit exercised by actors who already are part of the constituted powers under the existing constitution. In this case, the existing constitution cannot give a solution; political actors need to negotiate to redefine what could be the the meaning of joint action under the constitution.<sup>42</sup>

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39 The Turkish Vice President Küçük mentioned in his reply that Greek Cypriots had failed to that date to apply the provisions of the Constitution which favoured Turkish Cypriots.

40 See Soulioti, *Fettered*, 316-384.

41 See H. Gerken, 'Exit, Voice and Disloyalty', 1374, on J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) 363-365.

42 See H. Lindahl, 'Constituent Power and the Constitution', in *Philosophical Foundations of Constitutional Law*, (Oxford University Press, 2016), 157-159. In Cyprus, the 13 proposed amendments to the Constitution could be taken as an attempt to exercise secondary constituent power, as 9 out of the 13

When Turkish Cypriots withdrew from the government institutions and the parliament, and the two neutral presidents of the Constitutional and Supreme Courts resigned,<sup>43</sup> the executive, legislative and judicial powers could not function in line with the provisions of the Constitution of Cyprus. In this context, Law 33/1964 was passed, which provided that the two supreme courts (the Supreme Court and the Constitutional Court) would merge into a new Supreme Court. The law was passed by the majority of Greek Cypriots MPs.<sup>44</sup> The new Supreme Court no longer included a neutral president but had five members (three Greek Cypriots and two Turkish Cypriots, who were judges representing the two communities in the two merged courts).<sup>45</sup> Law 33/1964 is a direct departure from the provisions of the Constitution which established the two aforementioned courts with different jurisdictions. The Attorney-General of the Republic justified this move, invoking the urgency in which an efficiently functioning judicial system was needed.<sup>46</sup>

However, it was not the first time that the appeal to the necessity of emergency measures was invoked. In 1961, President Makarios ordered tax collection authorities to continue collecting taxes despite the absence of tax laws which, under the Constitution, had to be passed by 31 December 1960 [Article 188(2)] to replace previous colonial-era laws. In his address on this matter, the President spoke about the principle *salus populi suprema lex esto*. Thus, necessity becomes apparent in the constitutional discourse of the state bodies, as a principle which needs to be considered when applying the Constitution. Also, when the Council of Ministers issued its decree in which it attempted to apply the legislation on communities to municipalities, it invoked the doctrine of necessity. When it examined the case of separate municipalities, the Constitutional Court dismissed the argument that the doctrine of necessity could allow a departure from constitutional legality.<sup>47</sup> However, in that case, the minority view was held by the Greek Cypriot judge who expressed the opinion that reliance upon the doctrine of necessity can make it possible to tolerate deviations in terms of the application of

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amendments concerned non-revisable provisions of the Constitution. See A. Emilianides, *The Doctrine of Necessity, 50 years After: 'Reflections on the Cypriot zeroth law'*, in A. Emilianides, C. Papastylianos, and C. Stratilatis, *The Republic of Cyprus and the Doctrine of Necessity* (Athens: Sakkoulas Publications, 2016), 101. Also, throughout 1963-1964, the two communities held negotiations on amending the Constitution.

43 Canadian Judge Wilson, President of the Supreme Court, resigned in May 1964.

44 The law was adopted by the single majority of the Greek Cypriot MPs since the internal organization of the Courts does not require a double majority, according to the constitution. It should be noted also that in the preamble of the law, there was a direct reference to the necessity as justification for the enactment of the law, see Polyviou, *The Case of Ibrahim*, 37.

45 The Greek and Turkish Cypriot judges who already served on the previous Constitutional and Supreme Courts.

46 See Polyviou, *The Case of Ibrahim*, 27.

47 See Emilianides, *The Doctrine of Necessity*, 99-100, about the reliance of the state bodies on necessity before 1964 as a reason to defer from the Constitution.

specific provisions for as long as the necessity lasts.<sup>48</sup>

The new Supreme Court was called upon to review the constitutionality of Law 33/1964 in the *Ibrahim*<sup>49</sup> case. The court ruled that, although Law 33/64 departed from the Constitution,<sup>50</sup> it could, however, be justified and could enter into force under the doctrine of necessity. Based on the principles of '*salus populi suprema lex esto*' and '*necessitas non habet legem*' the Court held that article 179 of the Constitution which states that the Constitution is the Supreme law should be interpreted as being an obstacle to the self destruction of the state due to the rigid and strategic oriented application of the Constitution by key institutional actors. According to the reasoning of the judgment, the doctrine of necessity allows a departure from provisions of the Constitution which provide that the composition of certain state institutions should be on a bi-communal basis, if failure to depart from those rules makes it impossible for these bodies to perform their functions; that is, it becomes impossible for the State to function. The doctrine of necessity allows the government to depart from the process envisaged in the Constitution, when it is necessary for key state institutions, which are required for the state's existence, to continue their operation. This departure relates only to the legislative process, is allowed only for the duration of specific circumstances making it impossible for state bodies to function and is tolerated only insofar as it is not a disproportionate means for pursuing the purpose intended (functioning of the state bodies).<sup>51</sup>

As early as 1961, reliance upon the law of necessity, either in the form of *salus populi suprema lex esto* or in the form of the doctrine of necessity, is an evidence that a type one constitutional crisis occurs. Type one constitutional crisis is when political actors, in particular those with an institutional role, declare their intention to depart from the application of the constitution with a view to preserving social order and responding to the risk facing social order.<sup>52</sup> In Cyprus, almost one year from when the Constitution went into effect, the prospect of departing from the Constitution

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48 See n.38 above about these judgments and the minority view of the Greek Cypriot judge.

49 The *Ibrahim* case involves examining an appeal lodged in a criminal case. From the outset, the counsel to the defendant relied on the applicable Constitution to call into question the legitimacy of the composition of the court.

50 In addition to the merger of the two supreme courts envisaged in the 1960 Constitution and the change of their composition, Law 33/64 was neither published and signed by both the President and the Vice-President, nor published in Turkish as required by the Constitution [Articles 47(1)(e), 52, 3(1) and (2) of the Constitution].

51 See Polyviou, *The Case of Ibrahim*, 48, Kombos, *The Doctrine of Necessity*, 151-173. Due to the application of the proportionality test, the jurisprudence of the Supreme Court has not up to now ruled that the doctrine of necessity can justify any deviations from the rules which strictly specify under which conditions administrative bodies can issue administrative acts. On this issue, see Emilianides, *The Doctrine of Necessity*, 124-131.

52 See Levinson and Balkin, 'Constitutional Crises', 721.



appeared in the public discourse of institutional actors with a view to responding to the situation created by the diverging opinions of the two communities on the application of the Constitution. Next, this stance became the justification for the legislator's choices and the reasoning of court judgments. Therefore, a constitutional crisis with the characteristics of type one constitutional crisis was already present from the first year the Constitution of Cyprus was adopted.

It follows from the analysis set forth above that all forms of constitutional crises are inherent in the Constitution of Cyprus. Also, the appearance of the various types of constitutional crises is not linked over time. The engineering of the Constitution of Cyprus is the basic cause for constant occurrence of all three types, and most appear simultaneously. However, based on the distinction of three types of constitutional crises and their link to necessity, only the first type of crisis would cause reliance upon the application of the principles of the doctrine of necessity. Only when an institutional crisis is motivated by a situation where departing from constitutional legality is considered by institutional actors a necessary condition for the survival of the State is the crisis linked to the application of emergency law. It should, however, be noted that the doctrine of necessity, at least in the way it appears in the reasoning of the *Ibrahim* judgment, differs in various aspects from the forms of the law of emergency envisaged in modern constitutions.

### **Doctrine of Necessity and Emergency Law**

A key element for classifying a situation as an emergency is that the government cannot address it through the usual means it has for exercising power<sup>53</sup> by performing the functions envisaged in the Constitution for state bodies. For this reason, applying emergency law underpins the possibility that state bodies will depart from the usual functions in response to an emergency. The law of necessity allows the government to depart from adhering to either the separation of powers or the laws which guide how state bodies' functions should be performed to afford protection of citizens' fundamental rights.<sup>54</sup>

In Cyprus, however, the necessity was brought about because the bi-communal structure meant that no key state body could function after Turkish Cypriots officers had left their posts. The key characteristics of the emergency in Cyprus [the necessity], that is the factual background of the case, also caused the form of the doctrine of necessity to differ from other forms of emergency law. The critical issue in 1964 was

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53 See J. Ferejohn and P. Pasquino, 'The law of the exception: A typology of emergency powers', *ICON*, Vol, 2, No. 2 (2004), 226.

54 See for instance D. Dyzenhaus, 'States of Emergency', in *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld and A. Sajo (Oxford: Oxford University Press, 2012), 446-451; O. Gross, 'Constitutions and Emergency Regimes', in *Comparative Constitutional Law*, eds T. Ginsburg and R. Dixon (Cheltenham: Edward Elgar, 2011), 340-342.

not whether the principles of the rule of law and constitutionalism had detracted from state bodies being able to efficiently respond to an emergency inefficient, but rather that the bodies entrusted under the Constitution to observe the principles of constitutionalism and the rule of law were unable to function. The response to the emergency [necessity] in Cyprus does not require departing from the rule of law and constitutionalism in order to be efficient; quite the contrary, it requires taking steps to ensure the state can continue to function.<sup>55</sup> The doctrine of necessity formulated in the *Ibrahim* case is not about departing from the principles of the rule of law and constitutionalism but from the content of the process, which is necessary for the efficient application of these principles.<sup>56</sup>

These specific characteristics become obvious in the judgement's reasoning. The doctrine of necessity as it has been enshrined in *Ibrahim* does not, in principle, affect the separation of powers. On the contrary, whenever an attempt was made in subsequent cases to justify a departure from the principle of separation of powers, the Supreme Court held that such a deviation cannot be accepted under the doctrine of necessity formulated in the *Ibrahim* judgment.<sup>57</sup> That is, the doctrine of necessity is not the basis for strengthening the powers of the executive branch at the expense of the legislative branch, as is the case in the states of emergency envisaged in modern constitutions.<sup>58</sup> Also, the doctrine of necessity, as was initially conceived in the Constitution of Cyprus, does not represent a reason to limit the fundamental rights of the citizens beyond those reasons listed in it.

The Supreme Court was reluctant to admit the doctrine of necessity as a reason for limiting the rights of individuals exactly because the underlining reasoning of the

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55 One of the most important elements in Judge Triantafyllides' reasoning is about the constitutional duty of state institutions to perform their functions and to exercise their powers to the extent that this is possible, even if they cannot perform such functions or exercise such powers to the full extent provided for in the constitution. It is an approach which does not treat constitutionalism as a mere limit to state power [negative constitutionalism] but as a set of principles which define the relationship between the constitution and the state which creates the organizational structure necessary for the constitution to operate as a limit, that is the institutions which make it possible to implement the principles are included in the negative version of constitutionalism. This second aspect of constitutionalism brings out its positive dimension. See N.W. Barber, 'Constitutionalism: Negative and Positive', *Dublin University Law Journal*, Vol. 38, No. 2 (2015), 249-264. On the importance of a positive perception of constitutionalism see also S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press, 1995), 161-169, and S. Levinson, 'Reflections on What Constitutes "a Constitution": The importance of "Constitutions of Settlement" and the Potential Irrelevance of Herculean Lawyering', in *Philosophical Foundations*, 75-95.

56 See P. Polyviou, *The Case of Ibrahim*, 68.

57 See A. Emilianides, *The Doctrine of Necessity*, 115-124. See also *President of the Republic v. House of Representatives* [1985] 3 CLR 1429, *President of the Republic v. House of Representatives* [1985], 3CLR 2202, *President of the Republic v. House of Representatives* [1985] 3 CLR 2281.

58 See W. Scheuerman, 'Presidentialism and Emergency Government', in *Emergencies and the Limits of Legality*, ed. V. Ramraj, (Cambridge: Cambridge University Press 2009), 258-286.

Court's judgment in the *Ibrahim* case was the need for specific state bodies to function in order to protect rights.<sup>59</sup> Finally, following many years of vacillation, the Supreme Court conceded that the doctrine of necessity may serve as the basis for restricting rights enshrined in the Constitution.<sup>60</sup> However, this admission does not fit perfectly with the logic of emergency law, according to which, derogation of certain individual rights is necessary for state bodies to be able to perform their functions in a fashion which allows them to efficiently respond to an emergency.<sup>61</sup> A main characteristic of emergency law is that a derogation from rights is permitted, albeit temporarily, and such derogation operates as an internal restriction to rights, namely a restriction which initially determines whether in a certain situation a right holder may or not raise a prima facie claim founded on the right he/she holds. Internal restriction is a restriction which places actions outside the scope of protection afforded by the right, because they do not fall under the generic term, which is the object of the protection afforded by a right.<sup>62</sup> Thus, right holders are unable to raise prima facie claims concerning the implementation of constitutional provisions for the protection of their rights.

In Cyprus, it was only in certain cases with regard to property rights that restrictions were placed based on the doctrine of necessity, which could be taken to be within the logic of internal restrictions imposed when the derogation from rights is activated under emergency law. In these cases, according to Supreme Court case law, the doctrine of necessity justifies the non-application of certain provisions of the Constitution due to an insurmountable social need [Turkish invasion and occupation of 37% of the territory of the Republic of Cyprus since July 1974]. In these cases, the doctrine of necessity operates as an internal restriction by allowing the derogation from the application of the respective constitutional provisions, just like an emergency declaration causes the application of rights to be deferred for a certain time. Such a case is when property is requisitioned for military purposes. Although Article 23(8) of the Constitution provides for compensation to be paid and a maximum requisition period of three years, the Supreme Court held that, under the doctrine of necessity,

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59 C. Kombos, *The Doctrine of Necessity*, 218. The court examined the issue of the doctrine of necessity as a source for restrictions on rights for the first time, in *Constadinos Chimonides and Evantia Maglis* [1967] 1CLR 125. The majority of the Court held that the doctrine of necessity could not be a source for restrictions upon rights other than those provided by the Constitution. In *Apostolides v Republic* [1982] 3CLR 928 the Court held that there are implied restrictions on rights beyond those provided by the constitutional text, but still it was reluctant to recognise as a source of those restrictions the doctrine of necessity, instead the Court relied on the police powers of the state.

60 In *Aloupas and another v. National Bank of Greece* [1983] 1 CLR 55.

61 Only in cases involving the right of property does the doctrine of necessity fit into this logic. See below.

62 For a distinction between internal and external restrictions on rights, see S. Gardbaum, 'The Structure and Scope of Constitutional Rights', in *Comparative Constitutional Law*, eds. T. Ginsburg and R. Dixon, 387-388.

derogations may be justified from the rule set out in that Article.<sup>63</sup> This is different from when restrictions envisaged in the Constitution were imposed but the Constitutional process was not followed in passing the respective law due to Turkish Cypriots withdrawing from state bodies. Therefore, in such cases the doctrine of necessity does not introduce any restrictions in addition to those envisaged in the Constitution, as the relevant constitutional provision provides that restrictions may be imposed by law. The doctrine of necessity only justifies departing from the law adoption process envisaged in the Constitution.<sup>64</sup>

In other cases, the doctrine of necessity in Cyprus operated as an external restriction on rights. An external restriction is about whether public interest can justify putting aside claims of an individual right. However, under external restrictions, *prima facie* claims that can be based on a right do not become inactive, because they are simply restricted under certain conditions that can be verified by the court.<sup>65</sup> A typical example in which necessity acts as an external restriction on rights is the *Aloupas* case where, for the first time, the law of necessity was recognized as the basis for restrictions that could be imposed on rights.<sup>66</sup> In that case, the crucial legal issue was whether and to what extent protecting the right of an individual could affect the conflicting right of another individual. Both individuals may raise *prima facie* claims based on their respective rights, and the judge must resolve the case by weighing both claims without considering one of the two *prima facie* claims as inactive. The judicial review of internal and external restrictions focuses on different issues depending on

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63 In these cases, according to Supreme Court case law, the doctrine of necessity justifies the non-application of certain provisions of the Constitution due to an insurmountable social need (Turkish invasion and occupation of 37% of the territory of the Republic of Cyprus). In these cases, the Doctrine of Necessity operates as an internal restriction, by suspending the application of the respective constitutional provisions, just like the application of emergency law causes the application of rights to be suspended. These are cases involving the requisition of property for military purposes. Although Article 23(8) of the Constitution provides for compensation to be paid and a maximum requisition period of three years, the Supreme Court held that under Doctrine of Necessity derogations may be justified from the rule set out in that Article. See, *Omiros Aristides and Others v. The Republic* [1983] 3CLR 1507 on the non-payment of compensation for requisition and *Andrian Holding Ltd v. Republic of Cyprus* [1999] 3 CLR 828 on exceeding the maximum requisition period. Similarly, the management of property abandoned by Turkish Cypriots by the Guardian of Turkish Cypriot Properties is too a form of property confiscation in addition to those envisaged in the Constitution of Cyprus tolerated under the Doctrine of Necessity, see *Panagiotis Kitsis v. Attorney-General of the Republic*, 1 AAD 1077, [2001].

64 See *Antonakis Solomonides Ltd v. Attorney-General of the Republic*, Civil Appeal, 11303 [2003] 1 CLR 1275, on restrictions that may be imposed on property of Turkish Cypriot religious institutions, which under the Constitution of Cyprus (Article 23(10)) may be imposed only by decision of the Turkish Communal Chamber.

65 For a definition of external restriction see Gardbaum, *The Structure and Scope*, 387-388.

66 See footnote 60. In this case, the constitutionality of Articles 3 and 4 of Law 24/79 was examined. These Articles suspended the right of a creditor to recover his debt from a debtor whose property had been affected by the invasion and occupation.

the restriction involved. In the former case, the crucial matter is whether a specific action is protected by a fundamental right. In the latter, it is examined whether an action, which, in principle, falls within the scope of protection afforded by a right, can be justifiably restricted for reasons that have to do with the public interest.<sup>67</sup> Where emergency law operates as an internal restriction, judicial review is mostly about whether the steps taken are lawful, that is whether they fit into cases for which the law envisages the derogation from a right and not whether that law *per se* is aligned with the Constitution.<sup>68</sup> When faced with an emergency which operates as an internal restriction, courts mostly follow two courses of action: (a) they examine whether an action is or is not prohibited due to necessity; and (b) they examine the actions of authorities from an institutional point of view, that is whether the processes envisaged were observed and not whether the processes *per se* infringe any rights.<sup>69</sup> Declaring an

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67 See Gardbaum, *The Structure and Scope*, 389.

68 This observation does not imply that an emergency situation, acting as an internal restriction, is not subject to judicial review. In principle, an emergency operates as an internal restriction on rights only where the Constitution envisages the suspension of certain rights at a time an emergency is declared, and concerns only the rights whose application is suspended for the duration of the emergency. In this case, judicial review is about whether the steps taken to respond to the emergency correspond to those envisaged in the law. A typical example is the case *Ex Parte Endo* 323 U.S. 283 (1944), where it was found that US citizens of Japanese origin could not be detained because a decree existed which established that they could only be removed from their place of residence. Also, the courts can verify if the steps are taken by the competent body or not [See *Ex parte Merryman*, 17 Cas.144 (1861)] or even whether the conditions for declaring a country in a state of emergency were met. In the latter case, however, if the conditions for declaring an emergency were not satisfied, the steps taken to restrict rights should be considered as external restrictions. Yet, as the jurisprudence on the *War against Terrorism* indicates even if there is no declaration of an emergency courts tend to consider emergencies as an internal restrictions on rights. A typical example is the case *A v. Secretary of State for the Home Department* (2004), where the Court held that evidence acquired through cruel treatment could be excluded by courts only on the condition that can be proved beyond any doubt that they were acquired directly under torture. Also in the cases that were reviewed by the US Supreme Court as to the applicability of Habeas Corpus, the critical issues that were examined by the Court were whether (a) detainees have prisoner status, (b) the territory on which they are detained is considered territory under US control, and (c) they come from countries at war with the US. Thus they were not examined strictly on grounds concerning the justifiability of the restrictions which were imposed on rights due to the emergency, but on grounds related to whether or not each individual case fits the criteria which justify their status as persons who are entitled to less protection due to the emergency. See S. Humphreys, 'Normalcy: On the Rule of Law and Authority in Giorgio Agamben and Aristotle', *Cambridge Review of International Affairs*, Vol. 19, No. 2 (2006), 346; and Scheppele, 'Legal and Extralegal Emergencies', 176-177.

69 For the first kind of judicial review, see D. Cole, 'Judging the next Emergency: Judicial Review and Individual Rights in Times of Crisis', *Michigan Law Review*, Vol. 101, No. 8 (2003), 2572-2573. For the second form of judicial review, see S. Issacharoff and R. Pildes, 'Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during War Time', in *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. M. Tushnet (Durham, NC: Duke University Press, 2005), 161-197.

emergency, where such a declaration is envisaged,<sup>70</sup> causes the temporary suspension of specific constitutional provisions. The crucial legal issue in these cases is not whether the suspension restricts a right, but whether it can be founded on applicable constitutional provisions on emergency.<sup>71</sup> Consequently, states of emergency create a gap between rights and legality.<sup>72</sup> The action of state bodies is subject to a legality check by the courts, but it is not also reviewed strictly on the grounds of human rights law.<sup>73</sup>

On the other hand, where emergency law operates as an external restriction on a right, judicial review is about whether the content of it is in line with the Constitution. In order to review the legality of measures, the court also reviews the contents of the measures to ensure they are aligned with all constitutional provisions.<sup>74</sup> In Cyprus, the first time the court recognized that the doctrine of necessity can restrict rights, it was recognized in the form of an external restriction, although subsequently, the doctrine of necessity operated also as an internal restriction, as has already been mentioned above. But only in the cases that the doctrine of necessity has the form of an internal restriction, can we agree that the doctrine of necessity operates within the paradigm of emergency law, namely as a restriction on rights which takes the form of the suspension of rights.<sup>75</sup> These two forms of restriction [internal–external] coexist in the Supreme Court case law in regard to the doctrine of necessity, as the foundation of restrictions on rights. So far, however, the first form concerns only the right of property.

In addition, in Cyprus, the doctrine of necessity has a third dimension in connection with rights. This dimension highlights its apparent differences from other forms of emergency law. In some cases, the doctrine of necessity served as the basis for extending rights and not restricting them. There are two examples in which this

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70 Declaring an emergency is not provided as a means for confronting emergency in all constitutions. See O. Gross, *Constitutions and Emergency Regimes*, 336.

71 In constitutions which provide that the courts can review the declaration of an emergency regime, *ibid* 342. Such a review is also possible under the art 15 of the *ECHR*. The importance of such review is not underestimated since it allows the Courts to judge on whether or not a case can act as an internal restriction upon human rights. Yet, it does not alter the condition that any case that is considered as emergency according to the relevant provisions is an internal restriction upon rights which can be confronted not through a balancing process which can accept only restrictions on rights and not their full derogation even for a limited time.

72 T. Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism', *Modern Law Review*, Vol. 68, No. 2 (2005), 559.

73 See D. Dyzenhaus, 'Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?', *Cardozo Law Review*, Vol. 27 (2006), 2030-2037, Sheppele, 'Legal and Extralegal', 176-177.

74 The distinction between internal and external restrictions on rights and the limits they put on the judicial review of the legislator's options is not considered in approaches which uncritically treat the steps taken during a financial crisis as a form of emergency law, that is, as an internal restriction on rights, when these are steps which fit into the logic of external restrictions.

75 See footnote n.63.

happened. The first case is about the right of Turkish Cypriots to marry, which is enshrined in Article 22 of the Constitution for all citizens of Cyprus. However, exercising this right requires a law to be passed which, pursuant to Article 87(1)(c) of the Constitution, the Turkish Cypriot Communal Chamber had to vote on for their community, but the Chamber had ceased to exist after 1963.<sup>76</sup> The second case is about the right to vote of Turkish Cypriots who remained in free areas of the island and could not exercise that right because they needed to be registered in separate electoral lists of their community [Article 63 of the Constitution], which no longer existed as of 1974. In the latter case, the party concerned appealed to the Supreme Court, relying on the fact that, under the doctrine of necessity, departing from the application of the relevant constitutional provisions should have been permitted to enable them to exercise their rights. The Supreme Court dismissed the appeal, arguing that the judiciary cannot substitute for the legislature, the only branch competent to vote for a law relying on the doctrine of necessity.<sup>77</sup> The parties concerned appealed to the ECHR, which found that, in both cases, the position of the Cypriot authorities was in violation of rights enshrined in the ECHR.<sup>78</sup> Then, Parliament relied on the doctrine of necessity to pass two laws<sup>79</sup> that came to fill the legal gap which prevented Turkish Cypriots from exercising the rights concerned (the right to marry and the right to vote). The application of the doctrine of necessity in these cases is a logical extension of the conditions underpinning the doctrine in the *Ibrahim* judgment. According to these conditions, the doctrine of necessity supplements and does not compete with the rule of law and constitutionalism.

The principles of the doctrine of necessity, as they were initially formulated in the *Ibrahim* judgment and clarified in subsequent judgments, highlight the doctrine's dimension as a supplement to the rule of law and constitutionalism. Its foundation on the need for state bodies to function is based on an assumption related to the importance of law in the rule of law, even if this assumption was not expressly stated. The existence of the rule of law requires first the existence of a state functioning in accordance with the law. Therefore, if the bodies in charge of adopting and implementing laws do not function, as what happened in Cyprus, the condition for

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76 In these cases, enacting the Constitution implementation law is a constituent for the exercise of the right, because if the law did not exist it would be impossible to determine the key elements of the concept protected by the right, that is, should the legislature not define marriage, it would not be possible for the Constitution to protect marriage, as the holder of the right would not be able to have an effect on the legal reality and make use of the possibilities to act on the rights held. On the importance of Constitution implementation laws see R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2001), 123.

77 See *Aziz v. Republic of Cyprus* [2001] 3 CLR 501.

78 See *Selim v. Cyprus*, 16.07.2002, [friendly settlement] and *Aziz v. Cyprus*, 22.07.2004.

79 Laws 46 (1) 2002 and 2(1) 2006, respectively.

the existence of the rule of law is missing. This dimension [the relationship between the rule of law and law as means for social cohabitation has been showcased in several other cases outside Cyprus. The most well known is the case of Manitoba Language Rights Reference<sup>80</sup> in which the Supreme Court of Canada was called upon to rule on the validity of the laws of the Province of Manitoba, which had been published only in English despite express provision being made in the constitution of the Province that they should be published in both English and French. The court held that, although having published the laws only in English ran counter to a provision in the Constitution of the Province of Manitoba, the laws would remain in force until their translation into French, because otherwise, if they were to be repealed, chaos would reign. According to the court, that case involved a conflict of two different facets of the rule of law. The first one was about the obligation of the state bodies to function in accordance with the law, which they had failed to perform by failing to publish the laws in French. The second one was about the nature of the law as a constituent of social co-existence in a state organized based on law. The judiciary cannot ignore this second dimension when called upon to decide on a matter linked to the first dimension, as the existence of the first is conditional on the second.<sup>81</sup> There is certainly a difference between the Manitoba case and that of Cyprus. In the Manitoba case the judiciary relied upon and applied the doctrine of necessity, whereas the legislature did this in Cyprus. Yet, there is a common underlying reasoning in both cases; that is, the principle of effectiveness, which requires that the constitution and the state constituted by the constitution should be able to operate successfully in order to fulfil the fundamental values of the constitutional order.<sup>82</sup>

A second category of cases where necessity was determined by the law's primary importance as an instrument for regulating social relations and formed the basis to defer from the Constitution are cases where the US Supreme Court was called upon to rule on the validity of laws passed in States which declared their secession leading to the

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80 *Reference re Language Rights under the Manitoba act 1870* [1985] 19 DLR 1. There is a similar case within the context of the doctrine of necessity in Cyprus, in which the Supreme Court held that the doctrine of necessity can justify the non-implementation of the transitional provision of the Cypriot Constitution [art 189] which provided that the use of English language in judicial proceedings will end five years after the enactment of the Constitution until the translation of every law is completed. See, *Koumi v. Korttari and Another* [1983] 1CLR 856.

81 See P. W. Hogg, 'Necessity in a Constitutional Crisis', *Monash University Law Review*, Vol. 15, Nos. 3 & 4 (1989), 257.

82 On the issue of effectiveness as a presupposition for the operation of the Constitution and the state and how this issue affects the reasoning of the courts when judging about necessity, see, N. W. Barber and A. Vermuele, 'The Exceptional Role of Courts in the Constitutional Order', *Notre Dame Law Review*, Vol. 92, No. 2 (2017), 854. However, effectiveness should not be equated to stability. As Barber and Vermuele indicate, North Korea is a stable, but not a constitutional state in substantial terms. Effectiveness aims to preserve the essential aspects of constitutionalism and the rule of law and not override them, *ibid.*, 855.



US Civil War.<sup>83</sup> In recognizing the validity of laws regulating social coexistence but not of laws on the organization of the state (secession and joining in the Confederacy of states which seceded from the Union), the court based its reasoning on the distinction between the law as an element necessary for the organization of a state and as an element necessary to regulate social relations. This second dimension is separate from the first one and is reviewed independently by the judge as a factor the judge takes into account when reviewing a matter related to the first dimension (legality of actions taken by a state administration which lacks legitimacy under the Constitution of the US). However, in this case, too, which the *Ibrahim* case referred to as precedent of the application of the doctrine of necessity, there is a key difference in the reasoning of the two courts. What is crucial in the reasoning of the US Supreme Court on the validity of laws regulating social coexistence is the distinction between government and state. According to the judgment, during the Civil War, the State of Texas remained part of the Union although it was impossible to consider its government lawful under the US Constitution.<sup>84</sup> On the contrary, one of the key arguments made in the reasoning of the *Ibrahim* judgment was that despite the withdrawal of Turkish Cypriots, the government of Cyprus was the lawful government of the country.<sup>85</sup>

Another parameter that needs to be pointed out when analysing the doctrine of necessity is the distinction between states of emergency intended to preserve legality at a primary level (aiming at preserving the fundamental values of a constitutional order) and states of emergency intended to establish legality [to create the conditions which are necessary for the existence of such constitutional order].<sup>86</sup> This distinction is linked directly to the type of emergency situation, whose intensity and urgency

83 *Texas v. White*, 74 U.S. (7 Wall) 700, 1868.

84 See G. Ruthergerlen, 'The Rule of Law in Reconstruction: A Review of *Secession on Trial: The Treason Prosecution of Jefferson Davis*, by Cynthia Nicolleti', *Virginia Law Review*, Vol. 103 (2017), 84.

85 See, *Ibrahim*, 234-236. See also Security Council Resolution no. 18/64, which recognised that there is a lawful government in Cyprus. On this point see, Emilianides, *The Doctrine*, 113-114, Polyviou, *The Case*, 170-171. The international community's recognition of a government as a lawful one has implications on the external sovereignty of the state, the state is recognized as sovereign according to the rules of international law. Yet such recognition has certain implications with regard to the internal sovereignty of the state, since the recognition of a government as lawful involves a judgment on the ability of the holder of the internal sovereignty to exercise his/her authority efficiently and according to the law. On the issue of the relationship between the 'quality' of internal sovereignty and external sovereignty in International Relations, see L. Corrias, 'Guises of Sovereignty: "Rogue States" and Democratic States in the International Legal Order', in, *Deviance in International Relations, 'Rogue States' and International Security*, eds. W. Wagner, W. Werner and M. Onderco (Basingstoke: Palgrave Macmillan, 2012), 44-47, and J.R Krowford, *The Creation of States in International Law*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2007), 37-93.

86 On this distinction See, V. Ramraj, 2010, 'The Emergency Powers Paradox', in *Emergency Powers in Asia: Exploring the Limits of Legality*, eds V. Ramraj and K.Thiruvengadam (Cambridge: Cambridge University Press, 2010), 23.

depend on the degree of maturity of a constitutional order. The consequences of the inability of the two communities in Belgium to reach an understanding about critical issues differ from those of the respective situation in 1960 Cyprus, in as far as what constitutes an emergency. Where the key institutions implementing the principles of the rule of law are weak or do not function due to political violence, restoring their function by taking emergency measures also restores legality even if the adoption of such measures departs from legality which the existing Constitution provides for. Where a state of emergency is aimed at preserving or restoring legality, the principle of legality dictates the preservation of the procedural rules for declaring emergency and the adoption of the measures it leads to. However, when the institutions necessary to preserve or restore legality are initially absent or inactive, the emergency can justify measures to create the conditions necessary for establishing the institutional framework which is essential for the implementation of legality, namely measures which might mean derogations from legality in terms of compliance with the content of the rules of the existing constitution, especially when such rules are completely inactive.

In Cyprus the emergency which resulted from the withdrawal of the Turkish Cypriot officials from their posts does not fully correspond to any of the above mentioned cases. To be accurate it is a situation which included elements from both cases. In Cyprus, the emergency did not demand the establishment of a constitutional order from the very beginning, as there was one albeit a dysfunctional one, and there were also institutions which are necessary for the state to govern and for the rule of law, even during the colonial era. There was also a culture for settling differences through the implementation of law. Thus that emergency was not similar to a situation in which legality has to be established *ex nihilo*. On the other hand, those institutions that were unable to function had to be re-established in order to preserve legality. Nevertheless, the preservation of the constitutional order through the implementation of the doctrine of necessity did not equally affect all parts of the Constitution and did not imply derogation from the whole constitution. Separation of powers, as a model of checks and balances, had not been affected, and neither had the protection of rights, in a way similar to the traditional form of emergency law as was already mentioned above. The only part of the constitution which had been considerably affected through the derogation from the precise content of the relevant constitutional provisions, in fact altered totally, is the consociational bi-communal structure of governance.

### Concluding Remarks

The doctrine of emergency arose within the context of a completely dysfunctional constitution which had only an indirect legitimacy. The strategically oriented action of the key actors in the political arena, who were also the key institutional actors in the Cypriot constitutional order, lead to the collapse of the fragile consensus upon which the Cypriot constitution has been established. Thus, the doctrine of necessity is based upon the principle *salus populi suprema lex esto*, since the emergency, which the Republic of Cyprus had to confront, threatened the very existence of the state, even more than the kind of emergencies for which contemporary constitutions provide for a proclamation of emergency. The doctrine of necessity also is tantamount to derogation from the constitution. Certain provisions of the Cypriot Constitution are deferred due to the doctrine of necessity, as long as the emergency exists. These are the common elements that the doctrine of necessity shares with the dominant paradigm of emergency law.

However, there are important differences in relation to the dominant paradigm which make clear the importance of context as far as the implementation of legal concepts is concerned. In Cyprus the confrontation of the emergency did not demand derogation from the rule of law and the principles of constitutionalism. On the contrary, the source of the emergency in Cyprus was the inability of the institutions, which are necessary for the implementation of the fundamental values of constitutional order, to operate. The doctrine of necessity, as it has been enshrined in *Ibrahim*, is complementary and not competitive to the rule of law and constitutionalism. Under the doctrine of necessity, the separation of powers is still an operative principle of a system of governance based on checks and balances. Furthermore, the doctrine of necessity does not derogate from rights protection, analogous to the derogation which is established under the emergency law context. In fact, through the application of the doctrine of necessity, Cypriot citizens who reside to the areas controlled by the Republic of Cyprus are entitled to the same level of protection of their rights on the basis of their citizenship and not on their ethnic origin. Citizenship, through the implementation of the doctrine of necessity, acquired an inclusive dimension, while the common trend in the context of emergency law is quite the contrary, since emergency laws tend to allow derogation from protecting citizens' rights on the basis of their origin.<sup>87</sup>

Yet, the doctrine of necessity touches upon the bi-communal and consociational elements of the Cypriot Constitution. According to the doctrine of necessity, the composition of state organs cannot affect their operation up to the point that the

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<sup>87</sup> On this issue see the case *A v. Secretary of State for the Home Department* (2004), supra footnote no 68, and the Judgment of the ECtHR on the case *A and others v U.K.*, 19.02.2009 par 184-186.

strict adherence to composition rules causes the inability of an institution to exercise its competences. Thus, deferment of the relevant provisions (about the composition of state organs) can be justified through the doctrine of necessity. However, the degree of deferment which is acceptable under the doctrine of necessity is dependent upon the urgency of the issue which causes the emergency and the gravity of the derogation from the relevant constitutional provisions; derogation is related to the literal meaning and the underlying reasoning of the provision. In *Ibrahim* it has been explicitly stated that measures which are taken in order to confront the necessity should be proportionate to the gravity of the situation which caused the necessity.<sup>88</sup> If the necessity comes from the inability of state bodies to operate, then the measures taken in the name of necessity should restore the operational ability of the organ by allowing the least derogation necessary from the relevant provision. Derogation can be justified only to the extent that it leaves intact as much of the content of the provision as possible.<sup>89</sup> Thus, there is a difference when derogation means that an organ can operate without its full composition, as the Constitution provides, and when derogation permits the total alteration of the composition of a state organ. In the former case, the bi-communal composition of the institution is suspended for the duration of the emergency. In the latter case, the rule concerning the composition of the organ is altered. Nevertheless, the Supreme Court does not follow this balancing method strictly. In fact, the Supreme Court has implemented this method only with regard to cases referring to elected state positions and not to appointed positions.<sup>90</sup> In the latter case, through the implementation of the doctrine of necessity, the Court justified the appointment of Greek Cypriots to offices which should be covered by Turkish Cypriots, according to the Constitution.<sup>91</sup> However, it is doubtful whether such implementation of the doctrine of necessity is within the context of *Ibrahim* and the parameters which frame it.<sup>92</sup>

In conclusion, we should bear in mind that court judgments may introduce changes to the constitution in order to prevent the constitutional order from collapsing. These

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88 On the issue of the application of proportionality principle in the emergency law context see, V. Ramraj, *The Emergency Powers*, 50-52.

89 In fact the legislator was very careful while drafting the law 33/64 since the composition of the newly created court respects the bicomunal structure of the institution. Law 33/64 deviates from the relevant constitutional provisions since it merges the two supreme courts to one and sets aside the inclusion of neutral judges as heads of the court, yet, it is quite close to the underlying reasoning of the relevant provisions which aimed to establish a structure that is close to the other key organs of the state.

90 On this issue and the relevant jurisprudence of the Supreme Court see, A. Emilianides, *Beyond*, 139-142, and A. Emilianides, *Constitutional Law in Cyprus*, Kluwer, (2013), 45.

91 See *Re Georgiou* [1983] 2CLR 1, in which the Court ruled that a Greek Cypriot can be appointed to the post of Deputy Attorney General despite the relevant constitutional provision, which clearly stated that the Deputy should come from the Turkish Cypriot community.

92 Contra Emilianides, *Beyond*, 140 and Emilianides, *Constitutional Law*, 45.

kinds of judgments create conditions which may allow a new political consensus to emerge, by resetting the framework within which the main actors can still act inside the law,<sup>93</sup> however, judgments are unable to create the political consensus on their own.

## References

- Alexy, R. (2001) *A Theory of Constitutional Rights*. Oxford: Oxford University Press.
- Alexy, R. (2010) *The Argument From Injustice: A Reply to Legal Positivism*. Oxford: Oxford University Press.
- Barber, N. W. and Vermuele, A., (2017) 'The Exceptional Role of Courts in the Constitutional Order'. *Notre Dame Law Review*, Vol. 92, No. 2.
- Barber, N. W. (2015) 'Constitutionalism: Negative and Positive', *Dublin University Law Journal*, Vol. 38, No. 2: 249-264. Dyzenhaus, D. (2012) 'States of Emergency'. In M. Rosenfeld and A. Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press: 446-451.
- Choudhry, S. and Stacey, S. (2012) 'Independent or Dependent? Constitutional Courts in Divided Societies'. In C. Harvey and A. Swartz (eds), *Rights in Divided Societies*. Oxford: Hart Publishing.
- Cole, D. (2003) 'Judging the next Emergency: Judicial Review and Individual Rights in Times of Crisis'. *Michigan Law Review*, Vol. 101, No. 8: .
- Corrias, L., (2012) 'Guisers of Sovereignty: "Rogue States" and Democratic States in the International Legal Order'. In W. Wagner, W. Werner and M. Onderco (eds), *Deviance in International Relations, 'Rogue States' and International Security*. Basingstoke: Palgrave Macmillan.
- Dixon, R. and Ginsburg, T. (2011) 'Deciding not to Decide: Deferral in Constitutional Design'. *International Journal of Constitutional Law*, Vol. 9, No. 3-4: 636-672.
- Dyzenhaus, D. (2006) 'Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?'. *Cardozo Law Review*, Vol. 27.
- Emilianides, A. (2006) *Beyond the Constitution of Cyprus* [in Greek]. Athens: Sakkoulas Publications.
- Emilianides, A., (2013) *Constitutional Law in Cyprus*. The Hague: Kluwer.
- Emilianides, A. (2016) 'The Doctrine of Necessity, 50 years After: Reflections on the Cypriot zeroth law'. In A. Emilianides, C. Papastylanos, and C. Stratilatis, *Republic of Cyprus and the Doctrine of Necessity*. Athens: Sakoulas Publications.
- Elster, J. (2000) *Ulysses Unbound*. Cambridge: Cambridge University Press.
- Elster, J. (2013) *Securities against Misrule*. Cambridge: Cambridge University Press.
- Feldman, L. C., (2013) 'Lockean Prerogative: Productive Tensions'. In C. Fatovic and B. Kleinerman (eds), *Extra-Legal Power and Legitimacy: Perspectives on Prerogative*. Oxford: Oxford University Press: 75.
- Ferejohn, J. and Pasquino, P., (2004) 'The law of the exception: A typology of emergency powers'. *ICON*, Vol, 2, No. 2.
- Gardbaum, S., (2011) 'The Structure and Scope of Constitutional Rights'. In T. Ginsburg and R. Dixon (eds), *Comparative Constitutional Law*. Cheltenham: Edward Elgar.

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93 On this point see. N.W. Barber and A. Vermuele, 'Courts', 850-853.

- Gerken, H., (1971) 'Exit, Voice and Disloyalty'. *Duke Law Journal* Vol. 62: 1349-1386.
- Goldoni, M. (2018) 'The Material Constitution', *Modern Law Review*, Vol 81 No 4: 567-597.
- Gross, O. and Aoláin, F. N., (2006) *Law in Times of Crisis: Emergency Powers in Theory and Practice*. Cambridge: Cambridge University Press.
- Gross, O., (2011) 'Constitutions and Emergency Regimes'. In T. Ginsburg and R. Dixon (eds), *Comparative Constitutional Law*. Cheltenham: Edward Elgar.
- Hickman, T., (2005) 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism'. *Modern Law Review*, Vol. 68, No. 2.
- Hogg, P. W., (1989) 'Necessity in a Constitutional Crisis'. *Monash University Law Review*, Vol. 15, Nos. 3 & 4 .
- Holmes, S. (1995) *Passions and Constraints, On the Theory of Liberal Democracy*. Chicago, IL: University of Chicago Press.
- Humphreys, S., (2006) 'Normalcy: On the Rule of Law and Authority in Giorgio Agamben and Aristotle', *Cambridge Review of International Affairs*, Vol. 19, No. 2.
- Issacharoff, S. and Pildes, R., (2005) 'Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during War Time'. In M. Tushnet (ed.), *The Constitution in Wartime: Beyond Alarmism and Complacency*. Durham, NC: Duke University Press: 161-197.
- Kavanagh, A., (2016) 'The Constitutional Separation of Powers', in D. Dyzenhaus and M. Thorburn (eds), *Philosophical Foundations of Constitutional Law*. Oxford: Oxford University Press.: 221-240.
- Kombos, C. (2015) *The Doctrine of Necessity in Constitutional Law*. Athens: Sakkoulas Publications
- Krowford, J.R, (2007) *The Creation of States in International Law*, 2<sup>nd</sup> edition. Oxford: Oxford University Press: 37-93.
- Lerner, H., (2011) *Making Constitutions in Deeply Divided Societies*. Cambridge University Press.
- Levinson, S. and Balkin, J. M., (2009) 'Constitutional Crises', in *Pennsylvania Law Review*, Vol. 157, No. 3: 707.
- Lindahl, H., (2016) 'Constituent Power and the Constitution', in *Philosophical Foundations of Constitutional Law*, Oxford: Oxford University Press.
- Linz, J. (1994) 'Presidential or Parliamentary Democracy: Does it make a Difference?', in Linz, J. and Valenzuela, A. (eds), *The Failure of Presidential Democracy*. Baltimore, MD: John Hopkins University Press.
- Manitakis, A. (2004) *Greek Constitutional Law I* [in Greek]. Athens: Sakkoulas Publications.
- Mattie, S., (2005) 'Prerogative and the Rule of Law in John Locke and the Lincoln Presidency'. *The Review of Politics* Vol. 67, No. 1: 77-111.
- Michelman, F. (2001) 'Constitutional Authorship'. In L. Alexander (ed.) *Constitutionalism: Philosophical Foundations*. Cambridge: Cambridge University Press:
- Polyviou, P. (2013) *Cyprus on the Edge: A Study on Constitutional Survival*, Nicosia: Cryssafinis and Polyviou Publications.
- Polyviou, P. (2015) *The Case of Ibrahim, the Doctrine of Necessity and the Republic of Cyprus*. Nicosia: Chryssafinis and Polyviou Publications.
- Ramraj, V., (2010) 'The Emergency Powers Paradox'. In Ramraj, V., and Thiruvengadam,

- K. (eds), *Emergency Powers in Asia: Exploring the Limits of Legality*. Cambridge: Cambridge University Press.
- Ruthergerlen, G. (2017) 'The Rule of Law in Reconstruction: A Review of *Secession on Trial: The Treason Prosecution of Jefferson Davis*, by Cynthia Nicolletti'. *Virginia Law Review*, Vol. 103.
- Sartori, G. (1997) *Comparative Constitutional Engineering*. New York University Press.
- E. A. Young (2007) 'The Constitution Outside the Constitution'. *Yale Law Journal* Vol. 117, No. 3: 408-473.
- Scheuerman, W., (2009) 'Presidentialism and Emergency Government', in V. Ramraj (ed.), *Emergencies and the Limits of Legality*, Cambridge: Cambridge University Press: 258-286.
- Scheppele, K. L., (2008) 'Legal and Extralegal Emergencies'. In K. E. Whittington, R. D. Kelemen and G. A. Caldeira (eds), *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press: 165-187.
- Soulioti, S. (2006) *Fettered Independence: Cyprus, 1878-1964*, Vol 1. Minneapolis, MN: Minnesota University Press.
- Stokes Paulsen, M., (2004) 'The Constitution of Necessity'. *Notre Dame Law Review* Vol. 79, No. 4: 1257-1298.
- Tsebelis, G. (1990) 'Elite Interaction and Constitution Building in Consociational Democracies'. *Journal of Theoretical Politics* Vol. 2, No. 1: 5-29.

